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Supreme Court of the United States.

October Term, 1940.

No. 684.

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*,

v.

RICHARD J. REYNOLDS.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF OF AMICI CURIAE.

Orville Smith,
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BRIEF OF AMICI CURIAE.

This brief is filed by counsel who represent the petitioner in the case of *Augustus* v. *Helvering,* No. 819, now pending before this Court on a petition for a writ of certiorari. The brief is presented with the consent of counsel on both sides, which consent has been filed with the Clerk of this Court.

Question Presented.

The respondent's father died on July 19, 1918, and left him a contingent remainder in a trust. On April 4, 1934, the respondent became entitled to certain securities which he

then received from the trust. The question is whether the respondent "acquired" the securities when he became entitled to them in 1934, or on the death of his father in 1918, within the meaning of § 113(a)(5) of the Revenue Act of 1934.

Statute Involved.

The statute directly involved in this case is § 113(a)(5) of the Revenue Act of 1934. It reads as follows:

> If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition.

Provisions of earlier Acts and Bills which are material in establishing the proper construction of this section are included in the brief for the respondent in *Helvering* v. *Reynolds*, No. 684.

Argument.

I.

Section 113(a)(5) and its Legislative and Judicial History.

The statute involved in this case is § 113(a)(5) of the Revenue Act of 1934. It has been set out above. The sole question before the Court is the proper construction of the words "acquired" and "time of such acquisition" in this section.

The Government's position is that these words have the same meaning as if Congress had said "at the date of the death of the decedent." We contend that the words actually used by Congress cannot fairly and properly be given

this construction. Our position is supported by the decision of the court below, 114 F. (2d) 804, and is substantially supported by the opinion of the Second Circuit Court of Appeals in *Van Vranken* v. *Helvering*, 115 F. (2d) 709, where the court intimated that it would have accepted the construction for which we contend but for this Court's opinion in the case of *Helvering* v. *Hallock*, 309 U.S. 106.

The legislative and judicial history of § 113(a)(5) is rather extensive. It is presented in full in the brief for the respondent in this case. The presentation there was prepared in collaboration with counsel on the present brief, and it will not be repeated here. The steps through this material are somewhat detailed, but the path is not arduous, and if it is carefully followed, the result, we submit, is clear.

The conclusion from the historical material may be put in a sort of chronological form. The statutory words in question were first used by Congress in 1921, and continued without change until 1928. In the Revenue Acts of 1928 and 1932, a different formulation was adopted; but the original language was re-established in the Revenue Act of 1934. The materials available at the time the words in question were put back into the statute in 1934 lead surely to the conclusion that the words "acquired" and "at the time of such acquisition" did not refer, in all cases, regardless of the circumstances, to the date of the death of the original testator. If Congress had meant that conclusion, it would have used the words "at the date of the death of the decedent." On the contrary, it deliberately excluded those words from the statute in 1928, and did not put them into the statute in 1934. Moreover, the administrative and judicial construction of the words which Congress did use in 1934 was long continued and unbrokenly consistent at the time that Congress used them.[1]

[1] In their brief in the Circuit Court of Appeals in *Augustus* v. *Helvering* counsel for the Commissioner frankly conceded the

All the ordinary elements of construction point plainly to the conclusion that the words which Congress used did not mean "at the date of the death of the decedent." The only factor which could be suggested to point the other way is the Committee Report at the time of the adoption of the 1934 Act. But, as the court below held, and as we have developed in the material presented in the Reynolds brief, this Committee Report was dealing only with vested or unconditional interests and was not intended to relate to conditional interests of the sort involved in the present case. The Committee Report does not disclose any Congressional intention as to the treatment of conditional interests, and thus has no bearing on the question here.

Even if the Committee Report did deal with the present problem, its efficacy would raise a question of real moment. Committee Reports have their important function, of course. But, after all, Congress does not legislate by Committee Reports. On the contrary, Committee Reports are only relevant as they shed light on an ambiguous statute; a Committee Report cannot be relied on to import into a statute an ambiguity which is not there. Even if the Committee Report involved here was clear, specific, and unambiguous, it should furnish no basis, therefore, for changing the meaning of the words which Congress actually used in the statute itself; for the words which Congress actually used can hardly be said to be ambiguous in the light of the settled administrative and judicial construction at the time that

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judicial construction. They said (p. 25): "In so far as the judicial construction of the statute is concerned, we concede that in construing Section 202(a)(3) of the Revenue Act of 1921 and Section 204(a)(5) of the Revenue Acts of 1924 and 1926 the Board and the courts had held (prior to the enactment of the Revenue Act of 1934) that whether property was acquired by the remainderman at the time of the testator's death or subsequently depends upon whether or not his remainder was vested or contingent at that time, and that a contingent remainderman does not then acquire the property."

Congress re-established them. The rule stated in *Helvering v. City Bank Farmers Trust Co.,* 296 U.S. 85, 89 (1935), seems squarely applicable here:

> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

Here, if the Committee Reports are disregarded, it would seem clear that "there can be no doubt of the meaning of the words used," in the light of the uniform departmental and judicial construction. Congress cannot use "white" in a statute and make it mean "black" by saying so in a Committee Report. And this is *a fortiori* true where, as here, the Committee Reports contain nothing which deal in any way specifically with an uncertain and conditional interest such as that here involved, so as to show any intention that the statutory words should mean anything different from what they had uniformly been construed to mean in the earlier Acts.

II.

The Effect of Events Subsequent to the Re-enactment of the Statute.

From this point on, we shall assume that the Court agrees that the proper construction of the statute in the light of the materials available at the time of its enactment did not make it mean the same as if it had read "at the date of the death of the decedent." These were words which Congress did not enact, and which Congress once specifically refused to enact. If the Court accepts our contention as to the fair and proper construction of the statute on the basis of the materials available at the time it was enacted, then it be-

comes necessary to consider the possible effect of events which occurred after the statute was passed. There are three items of this sort: (A) The regulation issued under the re-enacted statute; (B) this Court's decision in *Helvering* v. *Hallock,* 309 U.S. 106; and (C) the recent decisions in the *Maguire, Gambrill,* and *Campbell* cases, decided March 31, 1941. We shall turn to these in the following portion of this brief.

A. Article 113(a)(5)-1 of Regulations 86.

Some time after the pre-1928 statutory language was reestablished in 1934, the Treasury issued a sweeping regulation, which appears as Article 113(a)(5)-1 of Regulations 86. This regulation, if valid, supports the Commissioner in the present case. We submit that it is not valid.

The statutory language in question was first enacted in 1921. No such regulation was issued at any time before 1935. On the contrary, as has been shown in the discussion of administrative and judicial history, the position of the Treasury was clear and continuous to the contrary, and was plainly expressed as late as 1932 in G.C.M. 10260, XI-1 Cum. Bull. 79, 80, and more than two years after this Court's decision in *Brewster* v. *Gage,* 280 U.S. 327. In *Augustus* v. *Helvering,* 118 F. (2d) 38, 43, the court referred to Article 113(a)(5) of Regulations 86 as "The first administrative interpretation" of the statute and said that such an interpretation "often expresses the general understanding of the times or the actual understanding of those who played an important part when the statute was drafted." This statement, it seems to us, is obviously inapplicable here. This regulation was not a contemporaneous regulation. It was not issued until nearly fourteen years after Congress had first used the language in question, during which time

the Treasury had consistently given the language a wholly different construction.

Nor is there any basis here for any argument on the ground of re-enactment after the issuance of the regulation in 1935. The regulation was clearly a change in the Treasury construction of words which Congress had used for many years. Moreover, the tax year involved here is 1934 and the regulation was not issued until 1935.

The situation thus is the same as that before the Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110. In that case there was a regulation followed by a re-enactment, then a change in the regulation followed by further re-enactment. This Court squarely rejected the argument that the later re-enactment amounted to a retroactive adoption of the changed regulation. It held instead that the earlier construction of the statute had become so firmly embedded in the law that it could not be changed by mere administrative action.

That, we submit, is the situation here. The words in question had been used in the statute for fourteen years at the time this regulation was issued. As we have tried to show in our discussion of the legislative, administrative, and judicial history, they had acquired a clear and settled meaning by the time they were re-established in the Revenue Act of 1934. And, apart from the effect of the prior long-continued construction of the statute to the contrary, this regulation should not stand here, for it was plainly modelled and based upon the Committee Report which has been discussed in detail in the brief for the respondent in this case. We have endeavored to show that the Committee Report does not properly bear the construction which the Government undertakes to put upon it, and that Congress cannot change the law by Committee Report. The regulation should have no higher standing than the Committee Report, and if the Committee Report falls, the regulation should fall with it.

The regulation in this case is inconsistent with another regulation of the Commissioner in a closely related field. In Article 113(a)(5)-1 of Regulations 86 the Commissioner has undertaken to say that property ultimately received by a remainderman is "acquired" at the death of the decedent no matter how contingent or uncertain the gift to the remainderman may be. Yet in Article 10 of Regulations 80 (1934 ed.), in effect at the time Regulations 86 was promulgated (and still in effect as Article 13 of Regulations 80 (1937 ed.)), it is provided that in computing the gross estate of a decedent for estate tax purposes—

> "Nothing should be included, however, on account of a contingent remainder in case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of an interest or an estate limited for the life of the decedent."

This regulation is of long standing. It first appeared in 1919 (Regulations 37 (1919 ed.), Art. 12), and has been continued without change in every subsequent edition of the estate tax regulations.[2]

This estate tax regulation is a natural and a proper one. If a man does not have anything at his death which is his to pass on to those who survive him, nothing should be included in his estate for tax purposes. The regulation applies both to contingent interests and vested interests subject to divestment upon the decedent's death—for such interests plainly come within the second sentence of the regulation quoted above. As long as either a condition precedent or a condition subsequent is outstanding, the dece-

[2] In addition to the two editions of Regulations 80 referred to above, see Regulations 37 (1921 ed.), Art. 12; Regulations 63 (1922 ed.), Art. 11; Regulations 68 (1924 ed.), Art. 11; Regulations 70 (1926 ed.), Art. 11; Regulations 70 (1929 ed.), Art. 11.

dent has not acquired or obtained anything that is his, that can be passed on to his beneficiaries. It would seem to be equally true that an interest subject to such conditions should not be regarded as "acquired" for income tax purposes. The fact that the Commissioner's regulation as to the income tax is inconsistent with his regulation dealing with the same problem in the estate tax field shows the artificiality and unsoundness of the income tax regulation.

It is not without significance that Article 113(a)(5)-1 of Regulations 86 was promulgated on February 11, 1935, at a time when the Treasury was undertaking to make rather extensive changes in the tax laws which had not been made by Congress. A very considerable number of regulations made during this period have already been held invalid as going beyond the proper field of administrative regulations. For example, in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U.S. 110, this Court held invalid a regulation made on May 3, 1934, which was inconsistent with the prior long-continued Treasury practice. Another instance is found in *Helvering* v. *Wood,* 309 U.S. 344, where this Court refused to apply one of the articles of the same Regulations 86 involved in this case, holding that it went beyond the language of the statute. Several administrative constructions made at about that time have been held invalid by this Court at the present term. Thus, in *Neuberger* v. *Commissioner,* 311 U.S. 83, this Court refused to follow administrative rulings made in the spring of 1935. In *Helvering* v. *Janney,* 311 U.S. 189, this Court held invalid Article 117-5 of Regulations 86, saying that the law as it was enacted "was subject to change only by Congress, and not by the Department." Similarly, in *Taft* v. *Helvering,* 311 U.S. 195, Article 23(o)-1 of Regulations 86 was held to be "ineffective to deprive" the taxpayers of the right conferred on them by "the Revenue Act of 1934, taken with the meaning we think it had when enacted." Still another provision of Regulations 86

was held invalid in *Helvering* v. *Oregon Mutual Life Insurance Co.*, 311 U.S. 267, where this Court held that Congress by the statute had "granted life insurance companies a deduction for disability reserves which only Congress can take away." Finally, in *Maass* v. *Higgins*, decided March 3, 1941, this Court held that Article 11 of Regulations 80, promulgated in 1937, was not warranted by the statute enacted by Congress.[3]

These illustrations are sufficient to show that the period around 1935 was not a time when the Treasury confined its regulations exclusively to administration. We recognize, of course, that the line between administration and legislation is far from clear, and that considerable freedom must be given to administrative authorities in construing novel provisions of law. But there comes a time when administrative activity is perhaps too ambitious, when there is too great a tendency on the part of the Treasury to make extensive changes in the law through administrative regulations, when those changes should, in a proper allocation of the powers of Government, have come from Congress. We do not contend, of course, that all new provisions in Regulations 86 are invalid. We have shown, though, that many of the provisions of Regulations 86 went too far, and we submit that Article 113(a)(5)-1 of Regulations 86 falls into this category. This was not a regulation about a novel provision in the law. The statutory language in question had been first used by Congress fourteen years before, and it had received a uniform and long-continued administrative construction, and a uniform judicial construction at the time

[3] Similar results have been reached in the lower courts. Thus, in *Commissioner* v. *Winslow*, 113 F. (2d) 418, the First Circuit held that Article 22(b)(1)-1 of Regulations 86, relating to the income taxation of life insurance proceeds paid in installments, "is contrary to the expressed intention of Congress and is invalid." The Second Circuit reached the same result in *Commissioner* v. *Bartlett*, 113 F. (2d) 766.

Congress re-established the language in 1934. In the words of this Court in the *Taft* case, this regulation should be "ineffective to deprive" the petitioner of the basis provision established by "the Revenue Act of 1934, taken with the meaning we think it had when enacted." The statutory language in question had by 1934 acquired a meaning, in the language of the *Janney* case, which "was subject to change only by Congress, and not by the Department."

We submit, therefore, that the regulation does not support the Government's case. It is obviously based upon a misconstruction and a misconception of the Committee Report, and therefore should be given no weight beyond that accorded to the Report itself. In so far as it goes beyond the statute, it undertakes to change the meaning of words which had had a long history in the Revenue Acts; it thus attempts too much of legislation and should be held invalid.

B. The Hallock Case.

On January 29, 1940, this Court decided *Helvering* v. *Hallock,* 309 U.S. 106. This case involved the construction of § 302(c) of the Revenue Act of 1926, dealing with the estate tax on transfers intended to take effect in possession or enjoyment at or after death. That question obviously has no direct relation to the one involved here. The *Hallock* case was, however, regarded by the Second Circuit in *Van Vranken* v. *Helvering,* 115 F. (2d) 709, as sufficient reason for reaching a construction of § 113(a)(5) contrary to that which it would have reached if the *Hallock* case had not been decided. It thus becomes necessary to give careful attention to the *Hallock* case and to its proper effect upon the case at bar.

What the *Hallock* case did decide, in the language of the court in the *Van Vranken* case, 115 F. (2d) at 710, was that in the construction of tax statutes "the whole distinction

of the common law between vested and contingent remainders was irrelevant." This was an important, and we believe sound, development. We see no reason to disagree with the conclusion of the Second Circuit that the distinction between vested and contingent remainders "is as little appropriate to § 113(a)(5) as to § 302(c) of the Estate Tax." 115 F. (2d) at 711. The error of the court in the *Van Vranken* case, we believe, was in failing to see that eliminating the distinction between technically vested and contingent interests in the construction of § 113(a)(5) does not mean that all interests are "acquired" at the date of death of the donor regardless of their nature.

The *Hallock* case seems to free us from the technicalities of the distinction between vested and contingent remainders in the construction of tax statutes. It still remains necessary to construe the statute, and specifically, in this case, to determine the proper meaning of the word "acquire." This important part of the problem was largely overlooked by the court in the *Van Vranken* case. On that issue the *Hallock* case would seem to be authority for the contrary conclusion and to establish that the interest of the respondent here was not "acquired" until 1934.

In the light of the *Hallock* case, therefore, the question in this case is to be determined without regard to the technicalities of the distinction between vested and contingent remainders or with variations of state law as to the label which is applied to the beneficiary's interest. Cf. *Burnet* v. *Harmel,* 287 U.S. 103; *Morgan* v. *Commissioner,* 309 U.S. 78. It does not matter whether a particular interest is contingent, or vested but subject to be divested on the same contingency. In either case the interest is conditional and should be subject to the same application of the statute. In the present case it has been determined that the interest of the respondent was a contingent remainder, and this Court has declined to review that decision. It is thus estab-

lished that the respondent's interest was conditional, and was not indefeasibly his until the property was delivered to him in 1934.

C. The Maguire, Gambrill, and Campbell Decisions.

On March 31, 1941, this Court decided the cases of *Maguire* v. *Commissioner, Helvering* v. *Gambrill,* and *Helvering* v. *Campbell,* Nos. 346, 472, and 473-475. These cases involved primarily the construction of the words "at the time of the distribution to the taxpayer" in § 113(a)(5) of the Revenue Acts of 1928 and 1932. These words do not appear in § 113(a)(5) of the Revenue Act of 1934 which is before the Court in this case. It is true that the Court in the *Maguire, Gambrill,* and *Campbell* opinions used some rather broad language in dealing with the question there decided. But there is nothing more thoroughly established in the tradition of our law than that the decision of a court applies only to the facts and issues then before it, and that no question is decided until the materials bearing on it have been fully presented to the court and considered by it.

Apart from the differences in the terms of the statutes involved, there is one major differentiation between the question which is now before the Court and that which has been recently decided. In the *Maguire* and related cases there was no significant pattern of legislative, administrative, and judicial history. This Court pointed out in footnote 12 of the *Maguire* opinion that the administrative construction was conflicting, and early in its conflict. Here the administrative construction was unbrokenly consistent for fourteen years, and until after Congress re-established the words in question in the statute in 1934. In the *Maguire* and related cases there was no judicial history at all. With respect to the present problem, the Government has conceded that the courts had uniformly reached a construction favorable to

the respondent's case prior to the enactment of the Revenue Act of 1934. In the *Maguire* and related cases the Court was dealing with an open question. Here the Court is called upon to construe language used by Congress against the background of an elaborate pattern of history which was wholly lacking (and almost entirely not before the Court) in the decisions reached last month.

There is another distinction of importance. The word before the Court in the present case is "acquired." That word has already been construed by this Court, directly in *Helvering* v. *San Joaquin Fruit & Investment Co.,* 297 U.S. 496, and indirectly in *Saltonstall* v. *Saltonstall,* 276 U.S. 260. The bearing of these cases on the present problem is developed in the following Point in this brief (*infra,* pp. 19-25). Neither of these cases is even cited, much less considered, in any of the *Maguire, Gambrill,* or *Campbell* opinions. It cannot be assumed that this Court intended to overrule a case which is so plainly right as the *San Joaquin* decision. It cannot be assumed that this Court will fail to follow the approach so clearly indicated by that case when it is directly involved in the present case.

The Government has filed a motion to reverse in the present case, evidently from a desire to foreclose full consideration of the question here. In this motion to reverse there is no mention of the pattern of legislative, administrative, and judicial history in which the question under the 1934 Act is enmeshed. There is no reference to this Court's decision in the *San Joaquin Fruit & Investment* case or in *Saltonstall* v. *Saltonstall.* Apparently the Government would prefer to have the present case disposed of without consideration of this material.

In its motion to reverse, the Government relies specifically on the decision in the *Gambrill* case that, for the purpose of applying the capital gains provision of the Revenue Act of 1928, property was "held" by a remainderman from the

time of the death of the decedent. Here again we have a different word, serving a different function, and in a wholly different historical setting. Moreover, the decision in the *Gambrill* case was in terms rested upon this Court's decision in *McFeely* v. *Commissioner*, 296 U.S. 102. It should hardly be overlooked that the *McFeely* case itself was based in part on "the rule . . . that a taxing statute . . . should be construed favorably to the taxpayer." 296 U.S. at 111. There is, to say the least, an element of irony in applying that case here.[4] Moreover, the *McFeely* case was founded squarely on this Court's decision in *Brewster* v. *Gage*, in 1930, which the Treasury itself did not regard as controlling the present question as late as 1932 and at the time the 1934 statute was enacted. G.C.M. 10260, XI-1 Cum. Bull. 79, 80 (1932).[5]

This Court's opinion in the *Maguire* case was likewise rested largely on *Brewster* v. *Gage*. This may have been proper as to the 1928 Act; but its application to the 1934 statute would ignore the long-continued administrative and judicial history which continued unbroken *after Brewster* v. *Gage* was decided in 1930, as well as before. Moreover, in the *Maguire* opinion the Court referred to *Brewster* v. *Gage* as involving an interest which "may not be unconditional." This ignores the fact that *Brewster* v. *Gage* itself was based

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[4] The Government did not even cite the *McFeely* case in its brief in the court below, or in its petition here.

[5] Similarly, in *Pringle* v. *Commissioner*, 64 F. (2d) 863, 865 (C.C.A. 9th, 1933), the court said: "The cases of Brewster v. Gage, 280 U.S. 327, and Chandler v. Field, 63 F. (2d) 13, are not controlling here. In each of those cases the interest became vested immediately upon the death of the testator." This Court denied certiorari, 290 U.S. 656. Certiorari was also denied in five other similar cases in 1933, 1934, 1935, and 1936. *Corwin* v. *Lane*, 290 U.S. 644; *Hopkins* v. *Commissioner*, 293 U.S. 560; *Warner* v. *Commissioner*, 293 U.S. 620; *Beers* v. *Commissioner*, 296 U.S. 620; *Twining* v. *Commissioner*, 299 U.S. 578. In the *Pringle* and *Lane* cases the petitions which were denied were filed by the Government.

on long-continued administrative construction specifically dealing with the question there involved (see 280 U.S. at 336-337), and that the Court specifically relied in *Brewster* v. *Gage* on the fact that the taxpayer's interest "vested immediately upon testator's death." 280 U.S. at 334. *Brewster* v. *Gage* can be made an authority for the Government here only by reading into it precisely the contrary of the bases on which it was in fact decided, and then by attributing to the year 1934 thoughts that did not exist at that time, as evidenced among other things, by this Court's repeated denials of certiorari.

We would call the Court's attention to a final reason as to why the *Maguire* and related decisions should not be regarded as controlling here. The question involved in this case is one of statutory construction. The statute was enacted in 1934, and the words used were a re-enactment of words which had first been put into the statute in 1921. The construction of a statute, it is fair to suppose, should be based upon the materials which were in existence at the time the statute was enacted. What is sought is the meaning of the statute which Congress passed, and a decision of this Court nearly seven years later on a different provision of a different statute would ordinarily have little direct bearing on that question.

Though a certain amount of fluidity of construction is undoubtedly desirable in the field of constitutional law, this is not true as to the construction of statutes, apart from a few ancient ones which have really become a part of the common law, such as the statute of frauds. Certainly the statute involved here is not of that category. These statutory words were used continuously from 1921 to 1928 and were re-established in 1934. The meaning of words so used ought not to be regarded as changing years after the provision was passed, at least without further action by Congress. The statute in question ought to be construed

now as it would have been construed by this Court immediately after it was enacted in 1934. It seems difficult to doubt what construction would then have been reached in the light of the pattern of legislative, administrative, and judicial history. For it should not be forgotten that to construe this statute as if it said "at the date of the death of the decedent" will be to make it mean precisely what it would have meant if Congress had put into the statute the very words which it refused to enact.

It should not be overlooked either that it is now twenty years since these statutory words were first used; and the question of the construction of the statute would long ago have been passed upon by this Court if the Treasury had not for fourteen years consistently followed the construction for which we contend. The construction now reached should not be different from that which would have been reached at an earlier period. Apart from questions of the proper relation of courts and legislature, at least three reasons may be found for this conclusion: (1) To reach a different construction now from what would have been reached in 1934 will result in discrimination. Over a period of many years the cases of innumerable taxpayers have been adjusted on the basis of the construction for which we contend, in many cases after controversy and litigation. We should all live under the same law, except as Congress changes it. (2) Unless the construction of a statute such as this is regarded as a fairly static thing based upon factors knowable as of the time of the enactment of the statute, the problems of the administration of the tax laws will be greatly aggravated. Taxing officers will never feel free to adjust a case as they think it should be adjusted because they cannot foresee shifts in the approach of the courts many years hence. The result will be a substantial increase in the volume of administrative controversy with noticeable consequence on the effective working of our tax administration

system. And finally, (3) to construe the statute now differently than it would have been construed in 1934 is in substance to give the statute a wholly retroactive construction. If Congress passes an amendment to a taxing statute, the amendment is applicable only to the year in which it was passed and prospectively. Yet a decision of this Court different from what would have been reached in 1934 would in effect be a retroactive amendment of the statute,[6] and that would be obviously unfair and contrary to any intention which it is possible to attribute to Congress. If these evils are to be avoided, we submit that the Court should endeavor to construe the present statute as it would have been construed when it was enacted in 1934.

How the statute would have been construed in 1934 and shortly thereafter may be thought to be evidenced by the uniform decisions of the Circuit Courts of Appeals in eleven cases,[7] all after *Brewster* v. *Gage* was decided, and with certiorari denied by this Court *six* times, in every case in which it was applied for. To this may be added this Court's own decision in *Helvering* v. *San Joaquin Fruit & Investment Co.,* which is set out in the following Point of this brief.

The problem is to ascertain what Congress meant, not what it might have provided if it had given more adequate consideration to the varying fact situations which might arise under the enactment. It may well be that the statute as it stands is defectively drawn. It may well be that Congress would have passed a better statute if it had said "at the date of the death of the decedent." But it did not use those words; it specifically refused to use them. The power to construe statutes should not be treated (in the words of Mr. Justice Cardozo in *A. L. A. Schechter Poultry Corp.* v.

[6] Cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673; *Great Northern Railway Co.* v. *Sunburst Oil Refining Co.,* 287 U.S. 358.

[7] These are cited and discussed at pages 13-18 in the brief for the respondent in this case.

United States, 295 U.S. 495, 551) as "a roving commission to inquire into evils and upon discovery correct them." [8]

III.

The Property was Not Acquired by the Respondent until 1934.

This Court has already considered the meaning of the word "acquired" as used in this same section of the statute, and has given the word a construction in accordance with its usual and accepted meaning, free of any artificiality or strain. The question came before the Court in *Helvering* v. *San Joaquin Fruit & Investment Co.,* 297 U.S. 496, where the issue was, in the Court's words (297 U.S. at 496): "Is real property 'acquired,' within the meaning of the revenue acts, when a lease is made containing an option to purchase, or when the option is exercised?" The Court held that the property was not "acquired" until the option was exercised, and this, it may be said, seems an obviously sound conclusion. In reaching this result the Court used this significant language (p. 499):

> "But even if we should agree that a lessee-optionee acquires, by virtue of the instrument, an equitable interest in the land it would not follow that, within the contemplation of the revenue acts, he acquires the property at the date of the option rather than at the date of conveyance. The word 'acquired' is not a term of art in the law of property but one in common use. The plain import of the word is 'obtained as one's own.' Language used in tax statutes should be read in the ordinary and natural sense. In the common and usual

[8] *Cf.* Pound, "Spurious Interpretation" (1907), 7 Col. L. Rev. 379.

meaning of the term the land was acquired when conveyed to the respondent's predecessor."

This case seems to be of very great importance in the present situation. Of course, it arose upon different facts. All cases do. But the differences upon analysis do not appear to be substantial, and the approach of the Court, clearly expressed, seems directly applicable here. The language quoted above may be followed through sentence by sentence and phrase by phrase, and each statement will be found to fit the present case. Thus, it may be argued that the respondent here acquired some sort of an interest in the property in question on his father's death. It does not follow that he acquired the property. As the Court said, the word "acquired" is one "in common use," and "should be read in the ordinary and natural sense." Its "plain import" is "'obtained as one's own.'" "In the common and usual meaning of the term," the securities involved here were not acquired by the respondent while his interest remained conditional.

There is another decision of this Court which seems to us to shed considerable light upon the "ordinary and natural" meaning of the word "acquired." The case in question is *Saltonstall* v. *Saltonstall*, 276 U.S. 260, where this Court upheld a Massachusetts tax on property passing at death by reason of the failure to exercise a power of appointment. In reaching this result the Court said (p. 271):

> "The beneficiary's *acquisition* of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here was *acquired* only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance." (Italics ours.)

It will be noted that in this passage the Court used both of the words which are material in § 113(a)(5), namely, "acquisition" and "acquired." The applicability of this decision to the construction of § 113(a)(5) is striking when it is considered in connection with the facts of *Augustus* v. *Helvering*, No. 819. There the interest of the beneficiary, among other infirmities, was subject to the life tenant's power to consume all of the property, and to the life tenant's power to appoint the property as she pleased. It would seem that this statement in *Saltonstall* v. *Saltonstall* is a clear indication of the "ordinary and natural" sense of the words of the statute as applied to such a situation.

It seems obvious that, within the ordinary usages of the English language, the respondent here did not "acquire" "the property" in question while he had only a contingent remainder. He did acquire some interest under his father's will, it is true. But the statute does not say that the basis of property shall be its value at the time some interest in the property is acquired. It says that the basis shall be the value at the time "the property" is acquired. In no "ordinary and natural" sense of the word can it be said that the petitioner here acquired "the property" until 1934.

To give the word "acquired" the construction for which the Commissioner contends would distort it beyond all recognition. It would mean that the respondent could have "acquired" property which never came to him. If the trustee had sold any of the shares in question, there can be no doubt that he would have taken the basis at the date of the testator's death on the ground that *he* then acquired the property. Yet the Commissioner's position is that the respondent here "acquired" the property at the same time. The Commissioner's construction might mean, in another case, that a person had "acquired" property many years before he was born—if the property ultimately came to a remainderman who was not living when the testator died. Such a

result, we submit, is not construction. *It could be reached only as a means of finding out what Congress might have said rather than what Congress actually did say in the statute before the Court.*

The artificiality of the construction is shown by the *Hallock* case itself. The decision there was that, since the death of the grantor did in substance free the grantee's interest from uncertainty, the transfer was one which "took effect" at the time of the grantor's death, regardless of the technical nature of the grantee's remainder interest. In the *Van Vranken* case the court properly brushed aside the technical distinction between vested and contingent remainders. But it then proceeded to treat all remainders as unconditional and conveying absolute ownership. This is squarely opposed to the decision in the *Hallock* case. If the court's conclusion were correct, there would have been no tax in the *Hallock* case, since the remainderman would have owned the property prior to the grantor's death, and the transfer could not have been held to have taken effect on that event.

The Commissioner's position is that property taken under a will is "acquired" in all cases at the date of the death of the decedent, regardless of the factual nature of the interest actually conferred by the will. If Congress had meant that the date of the death of the decedent should be used in all cases, it would have been very easy for Congress to use those words. We have already shown that Congress not only did not use those words, but once struck those very words out of the statute. But, quite apart from the whole matter of legislative history, to give the word "acquired" any such construction is to distort it in a way which would make a lexicographer shudder and the ordinary layman wonder at the ways of the law.

But, says the Commissioner, unless the word "acquired" is construed to mean "date of death of the decedent," there

will be a "gap," a period during which increase or decrease in the value of property may not be recognized for tax purposes. But the statutes as to basis are full of gaps. For example, increase in value of property from the date of purchase to the date of death of its owner is not now subjected to income tax, nor can decrease in value be deducted. There are numerous other examples which need not be repeated here. Whether or not there should be a gap is purely a matter of Congressional policy. When Congress could so easily have avoided the gap by using the words "date of death of the decedent," the fact that Congress did not use these words should not be tortured into a reason for construing the word "acquired" to have the meaning of the words which Congress refused to enact.

Indeed, there may have been very good reasons why Congress deliberately refrained from using the words "date of death of the decedent," which it knew how to use if it wanted to. We have no way of knowing all that went on within the Congressional Committees. The various statements and reports are formal documents, but it is well known that much of the actual drafting of statutes is done by legislative draftsmen outside of the Committees, and the Committees also conduct many of their deliberations in executive session. Thus, not all of the Committee's actions and reasons for their actions are recorded. There may have been good reasons why members of Congress entrusted with the formulation of this provision deliberately refrained from closing the "gap." The statute in question was enacted in 1934. That was not only after a period of sharply falling prices, but it was also at a time when Congress was severely restricting the deduction of capital losses in income tax returns. Congress may well have thought that, by putting the date of acquisition as late as possible, it would in general reduce deductions for capital losses. Thus, if a testator died in 1928, and the remainder fell in in 1934, the property

would ordinarily have a far lower basis if the 1934 valuation were to control. Congress may have concluded that at that period losses so eliminated would far exceed gains.

And this is not all. By the same Revenue Act of 1934, Congress in § 117(a) established a percentage basis upon which capital gain was to be taxed. Under this provision, gain on property held for not more than one year was taxed at 100%, and then the percentages were graduated down until only 30% of gain on property held for more than ten years was subject to tax. Thus, on the capital gain side, the later the property was acquired, the more the tax would be. For this reason, too, Congress may have deliberately desired to put the date of acquisition as late as possible. In this manner it tended in the ordinary case to push the basis low, and then to recognize as large a percentage as possible of the gain. It is true that this would have the effect of making a larger percentage of the loss recognizable as well. But this was not a serious matter from the tax point of view because, by § 117(d) of the Revenue Act of 1934, the net deduction for capital losses was limited to a maximum amount of $2000.

The question before the Court is not what would scientifically or abstractly be the best way to draft the statute. It is not how this Court thinks the statute should be drafted if it were being reformulated at the present time. The word that Congress did use was "acquired." It did not say "date of death of the decedent," and the word "acquired" cannot fairly be said to be the equivalent of that phrase under all facts and circumstances. This Court has authoritatively determined that the word "acquired" is to be read in its "ordinary and natural sense." *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U.S. 496, 499. In the ordinary and natural sense of the word, it cannot be said, we submit, that the respondent acquired the property in question while his interest was so conditional and subject

to infirmities as was the case here or in the *Augustus* case, No. 819.

In the *Van Vranken* case the court put its conclusion on "an unanalyzed and intuitive conclusion from the text as a whole." 115 F. (2d) at 711. We recognize that the use of language is not subject to mathematical precision. We submit, however, that before recourse is had to intuition, it is better to see whether the words used by Congress do not have "an ordinary and natural sense." Such a sense may readily be found here, and it leads to a conclusion favorable to the respondent.

Conclusion.

The judgment below is correct and should be affirmed.

Respectfully submitted,

Orville Smith,
Erwin N. Griswold,
Amici Curiae.

April, 1941.

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P 2 dissent

SUPREME COURT OF THE UNITED STATES.

No. 684.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Richard J. Reynolds.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 26, 1941.]

Mr. Justice ~~Douglas~~ delivered the opinion of the Court.

Respondent's father died in 1918, leaving him a remainder interest in a testamentary trust, an interest which the court below found to be contingent under North Carolina law. He received his share of the trust, including securities, from the trustee on April 4, 1934. Some of the securities so distributed had been received by the trustee from the decedent's estate and others had been purchased by the trustee between 1918 and 1934. During the year 1934 respondent sold some of the securities in each group. In computing his gains and losses he used as the basis the value on April 4, 1934, when he received the securities from the trustee. The Commissioner determined that the proper basis under the Revenue Act of 1934 (48 Stat. 680) was the value of the securities at the time of decedent's death in the case of those then held by decedent and their cost to the trustee in the case of those which the trustee had purchased. The Board of Tax Appeals sustained the Commissioner. 41 B. T. A. 59. The Circuit Court of Appeals reversed. 114 F. (2d) 804. We granted the petition for certiorari (exclusive of the question whether the remainder was vested or contingent under the law of North Carolina) because of a conflict among the circuits.[1]

Sec. 113(a)(5) of the 1934 Act provided: "If the property was acquired by bequest, devise, or inheritance, or by the decedent's

[1] Opposed to the decision below are Van Vranken v. Helvering, 115 F. (2d) 709; Cary v. Helvering, 116 F. (2d) 800; Archbold v. Helvering, 115 F. (2d) 1005—all from the Second Circuit; and Augustus v. Commissioner, 118 F. (2d) 38, from the Sixth Circuit.

estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition." The government places considerable stress on *Maguire* v. *Commissioner,* 312 U. S. —; *Helvering* v. *Gambrill,* 312 U. S. —; and *Helvering* v. *Campbell,* 312 U. S. —, decided under the 1928 and 1932 Acts, in support of its contention that as respects securities owned by decedent the proper basis was their value at his death even though respondent's interest was then contingent. And it also relies on Treasury Regulations 86, promulgated under the 1934 Act, Art. 113(a)(5)-1(b) of which provided that "all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise." Respondent on the other hand urges that the phrase "at the time of such acquisition" when it was included in the 1934 Act had acquired by construction a definite meaning which excluded contingent remainders and therefore that Congress must be presumed to have used those words in that sense. In that connection he points out that the phrase "at the time of such acquisition" had appeared in the 1921, 1924, and 1926 Acts[2] and that certain office decisions of the Treasury,[3] and certain decisions of the lower federal courts[4] under those acts, made prior to the enactment of the 1934 Act, had held that a beneficiary did not acquire property when his interest was merely contingent. Respondent emphasizes that the legislative history of the 1934 Act shows no mention of the prior administrative and judicial treatment of contingent remainders and makes no complaint with the practice of the bureau or with the decisions. He insists that the words "acquired" or "acquisition" are not vague or ambiguous words but mean to obtain "as one's own", as held in *Helvering* v. *San Joaquin Fruit & Investment Co.,* 297 U. S. 496, 499. By these arguments and related ones respondent seeks to demonstrate that the earlier rule had become embedded in the law so that it could

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[2] Sec. 202(a)(3), Revenue Act of 1921 (42 Stat. 229); § 204(a)(5), Revenue Act of 1924 (43 Stat. 258); § 204(a)(5), Revenue Act of 1926 (44 Stat. 14).

[3] O. D. 727, 3 Cum. Bull. 53 (1920); G. C. M. 10260, XI-1 Cum. Bull. 79, 80 (1932).

[4] See, for example, Pringle *v.* Commissioner, 64 F. (2d) 863; Hopkins *v.* Commissioner, 69 F. (2d) 11. Cf. Lane *v.* Corwin, 63 F. (2d) 767.

be changed not by administrative rules or regulations but by Congress alone. On the basis of such reasoning and the difference in wording between the 1934 Act and the 1928 and 1932 Acts, he seeks to distinguish the *Maguire*, *Gambrill*, and *Campbell* cases. And since Art. 113(a)(5)-1(b) was promulgated on February 11, 1935, respondent insists that to make it applicable to transactions occurring in 1934 would be to give it a retroactive effect contrary to *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110.

Respondent's position is not tenable. We are not dealing here with a situation where the meaning of statutory language is resolved by reference to explicit statements of Congressional purpose. *Maguire* v. *Commissioner, supra; Helvering* v. *Campbell, supra.* Here the Committee Reports[5] on the 1934 Act are wholly silent as to whether a taxpayer has acquired property within the meaning of § 113(a)(5) at a time when he has obtained only a contingent remainder interest. And we need not stop to inquire whether, in absence of the Treasury Regulations under the 1934 Act, the administrative construction of "acquisition" under the earlier Acts was of such a character (*Higgins* v. *Commissioner*, 312 U. S. 212) and the prior judicial decisions had such consistency and uniformity that Congressional reenactment of the language in question was an adoption of its previous interpretation within the rule of such cases as *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459. That rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change. *Morrissey* v. *Commissioner*, 296 U. S. 344, 355. And see *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299. It gives way before changes in the prior rule or practice through exercise by the administrative agency of its continuing rule-making power. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100-101. Nor is Art. 113(a)(5)-1(b) of the Regulations condemned by *Helvering* v. *R. J. Reynolds Tobacco Co., supra.* That case turned on its own special facts. The transactions there in question took place at a time when a regulation was in force which expressly negatived any tax liability. The regulation remained outstanding for a long time and was followed by

[5] H. Rep. No. 704, 73d Cong., 2d Sess., pp. 27-28; S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34-35.

several reenactments of the statute. About five years after the transactions in question took place the prior regulation was amended so as to impose a tax liability. There are no such circumstances here. No relevant regulation was in force at the time respondent sold the securities in 1934. The regulation here in question was promulgated under the very Act which determines respondent's liability. The fact that the regulation was not promulgated until after the transactions in question had been consummated is immaterial. Cf. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129. The magnitude of the task of preparing regulations under a new act may well occasion some delay. To hold that respondent had a vested interest in a hypothetical decision in his favor prior to the advent of the regulations would introduce into the scheme of the Revenue Acts refined notions of statutory construction which would, to say the least, impair an important administrative responsibility in the tax collecting process.

Hence the regulation governs this case if the word "acquisition" as used in § 113(a)(5) was susceptible of this administrative interpretation. We think it was. However unambiguous that word might be as respects other transactions (*Helvering* v. *San Joaquin Fruit & Investment Co., supra*) its meaning in this statutory setting was far from clear as respects property passing by bequest, devise, or inheritance. The definition of "acquisition" contained in the regulation is not a strained or artificial one. Admittedly the date of death would be the proper basis if respondent's interest under the testamentary trust had been a vested remainder. But even a vested remainderman does not have all of the attributes of ownership. So the test in this type of case is not whether respondent had full enjoyment of the property prior to the delivery of the securities to him but whether he earlier had acquired an interest which ultimately ripened into complete ownership. Respondent has become the taxpayer because he has obtained full ownership of the property and has sold it. The tax is on gains, if any, realized by him in that transaction. Hence, as we indicated in the *Maguire* and *Campbell* cases, to carry into that computation the value of the property at the time the taxpayer had only a contingent remainder interest in it is not to tax him on values which he never received. The statute as thus interpreted "merely provides a rule of thumb in alleviation of a tax which would be com-

puted by reference to the entire amount of the original inheritance were it to be based on cost to the taxpayer." *Helvering* v. *Campbell, supra,* p. —. As stated by Judge Arant in *Augustus* v. *Commissioner,* 118 F. (2d) 38, 43, the regulation was an "apt interpretation to make this part of the statute fit efficiently and consistently into the scheme of the revenue system as a whole." See *Maguire* v. *Commissioner, supra.*

Respondent's suggestion that the regulation does not cover this case will not stand analysis. It has a broad sweep and embraces all interests which have their origin in a bequest, devise, or inheritance.

For the reasons stated, the proper basis as to the securities owned by the decedent was their value at his death.

There remains the question as to the proper basis for securities purchased by the trustee. In the *Maguire* case we held that "cost" was the proper basis as provided in § 113(a) of the 1928 Act since securities purchased by a trustee were not "acquired . . . . by will" within the meaning of § 113(a)(5) of that Act. While § 113(a)(5) of the 1934 Act substitutes "acquired by bequest, devise, or inheritance" for "acquired either by will or intestacy" in the 1928 Act, that change does not call for a result different from that reached in the *Maguire* case. For the reasons there stated, we hold that as respects securities purchased by the trustee the proper basis is the cost to him. That makes it unnecessary to examine the validity of the holding of the court below that Art. 113(a)(5)-1(d) of the Regulations[6] is inapplicable because decedent did not die before March 1, 1913.

Reversed.

[6] "*Property acquired before March 1, 1913; reinvestments by fiduciary.*—If the decedent died before March 1, 1913, the fair market value on that date is taken in lieu of the fair market value on the date of death, but only to the same extent and for the same purposes as the fair market value on March 1, 1913, is taken under section 113(a)(14).

"If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died."

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SUPREME COURT OF THE UNITED STATES.

No. 684.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Richard J. Reynolds.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 26, 1941.]

Mr. Justice Roberts.

I disagreed with the decisions of the Court in *Maguire v. Commissioner,* No. 346, *Helvering* v. *Van Nest,* No. 472, and *Helvering* v. *Campbell, et al.,* Nos. 473, 474, and 475, of this term, construing the meaning of the phrase "time of distribution to the taxpayer", as used in § 113a(5) of the Revenue Acts of 1928 and 1932. My dissent was bottomed upon the view that to construe that phrase as meaning the time of the distribution to a trustee, in a case where the taxpayer could neither receive nor enjoy the property, was to disregard the unambiguous words of the statute. I recognize the binding force of those decisions but think that the Court's disposition of the present cases constitutes an even looser and less admissible construction, amounting, in effect, to legislation.

In all the revenue acts from that of 1921 to that of 1926, inclusive, the cognate provision was that if the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis should be the fair market value of such property at the time of such acquisition. In the revenue act of 1928 a new provision was substituted making the basis in the case of a general or a specific devise or of intestacy the fair market value at the time of the death of the decedent. The same basis was provided if property was acquired by the decedent's estate from the decedent. In all other cases, if the property was acquired by will or by intestacy, the basis was made value at the time of the distribution to the taxpayer. The language was retained in the Act of 1932. In the revenue act of 1934, § 113a(5)

was again cast in the exact language in which the cognate sections had appeared in all the acts prior to that of 1928.

The meaning of the provision is plain. What Congress was dealing with was the "property". It did not specify a right inchoate or otherwise, or an interest less than ownership, but used the colloquial ~~phrase~~ term "property". And Congress employed a word in common and ordinary use and not a technical ~~phrase~~ expression of conveyancers when it spoke of the time of "acquisition" of the property. Anyone reading the ~~phrase~~ sentence would be justified in concluding that if he sold property which came to him from a decedent's estate he must take as his basis of value the market value as of the date when he became the owner of the property; when he became able to enjoy it and dispose of it at his will.

The present decision finds that Congress did not intend any such thing; that, on the contrary, by a circumlocution, it meant that the taxpayer must take as his basis the fair value at the date of the decedent's death if his ultimate acquisition of the property is traceable to a decedent's will. Thus, though he had no use or benefit of the property, could not dispose of it, and might never enjoy it, he is to be treated as having acquired it.

A contrary conclusion is required by *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U. S. 496. There the Court, in applying the same section here involved, held that the term "acquired" was not a word of art; and though the acquisition had its origin in an option which the taxpayer exercised, as here the acquisition had its origin in a will, agreed with the Government's contention that the time of full enjoyment as one's own is the date of acquisition, not the time of obtaining some inchoate interest which may or may not ripen into ownership.

But if there were doubt as to the meaning of Congress, the legislative history should preclude the strained construction now adopted. In the *Maguire* and related cases administrative construction and legislative history were meagre and inconclusive. Here violence must be done to a substantial volume of such aids to construction to reach the announced result.

In 1920 the Treasury ruled that

"Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property

by the remaindermen is its value as of the date of death of the life tenant."[1]

There is no dispute that between 1920 and 1935 the Treasury uniformly so interpreted the statutory provision now otherwise construed. In 1930 this Court held that in the case of a residuary legatee whose property rights attached at the moment of death, and who was in contemplation of law and in fact the owner of the property bequeathed to him from the date of death, the time of acquisition was the date of death.[2] The decision obviously did not touch a situation such as that disclosed in the present cases and the Treasury so understood. In 1932 the General Counsel of the Bureau of Internal Revenue rendered an exhaustive opinion in which he referred to, and analyzed, our decision and summarized the administrative practice by saying:

> " . . . the position of this office has been that one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested. (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V-1, 60.) See also I. T. 1622, C. B. II-1, 135; S. O. 35, C. B. 3, 50."

The judicial construction was uniform to the same effect.[3]

That the Treasury thought the distinction between the acquisition date of vested and contingent interests improper is attested by the fact that in its briefs on applications for certiorari in several of the cases cited in Note 4 it so stated; and in the *Pringle* case it strenuously contended for a reversal of the judgment on that ground. In its brief in support of its petition for certiorari in the *San Joaquin* case, *supra,* which arose under the very section now in question, the Government said: "It is quite generally recognized that the holder of a contingent estate in property does not acquire the same within the meaning of the revenue acts until the estate becomes vested." (Citing several of the cases found in the note.) Of course that statement supported the position of the Government in that case. But a new view has apparently emerged, which better serves the Government's interest here.

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[1] O. D. 727, 3 C. B. 53.

[2] Brewster *v.* Gage, 280 U. S. 327.

[3] Lane *v.* Corwin, 63 F. (2d) 767; Pringle *v.* Commissioner, 64 F. (2d) 863; Hopkins *v.* Commissioner, 69 F. (2d) 11; Becker *v.* Anchor Realty and Investment Co., 3 F. Supp. 22, aff'd 71 F. (2d) 355; Warner *v.* Commissioner, 72 F. (2d) 225; Beers *v.* Commissioner, 78 F. (2d) 447.

It seems plain that when, in 1934, Congress decided to re-adopt the language used in the revenue acts from 1921 to 1926, inclusive, it should be taken as having adopted it not only with a sense of its plain meaning but with a recognition of its uniform interpretation. We are not left, however, without light shed by the legislative history and that history furnishes confirmation of the view that Congress did not intend to give any strained, extraordinary, or unusual meaning to its language or to disregard its accepted significance.

The revenue acts have always treated estates as taxpayers for purposes of income tax. From the adoption of the revenue act of 1918 the Treasury Regulations uniformly provided that if an executor sold estate property he must take as a basis the value of the property at the time of the decedent's death for calculating taxable gain.[4] The Treasury treated the estate's time of acquisition as the date of the decedent's death within the meaning of the sections of the revenue acts from 1921 to 1926. In 1926 the Court of Claims held that when Congress used the terms "acquired" and "acquisition" it meant that the executor might take, as the basis date, the date of acquisition by the decedent.[5] This decision upset the uniform practice of the Treasury and required an amendment of the regulations to conform to it. Congress was confronted with this situation when it came to pass the revenue act of 1928. The history of what happened in this respect is most enlightening. The Joint Committee on Internal Revenue, in its report,[6] referred to the difficulty created by the *McKinney* decision, and the doubt the decision had thrown on the meaning of acquision, and stated, with respect to the proposed section: "The 'date of death' is recommended to make the basis certain and definite." The Ways and Means Committee also rendered a report to accompany that of the Joint Committee. In this it said:[7] "It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113(a)(5)." It con-

[4] See Hartley *v.* Commissioner, 295 U. S. 216, 220.

[5] McKinney *v.* United States, 62 Court of Claims, 180.

[6] House Document No. 139, 70th Cong., 1st Sess., pp. 17-18.

[7] H. R. No. 2, 70th Cong., 1st Sess., p. 18.

tinued: "It is also provided, in the same paragraph, that the basis *in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.*" (Italics supplied.)

It is thus abundantly clear that Congress knew how to write a statute to accomplish what the opinion of the Court holds totally different language accomplishes.

The Senate Committee on Finance rewrote the subsection as embodied in the House Bill, altering it to read as it does in the Revenue Act of 1928.[8] This was the section which was construed in *Maguire* v. *Commissioner* and related cases.[9] It thus appears that Congress rejected the verbiage intended to specify the date of the decedent's death as the basis date to be taken by a beneficiary under the decedent's will.

With this background Congress, in adopting the 1934 act, discarded the various basis dates prescribed by the Acts of 1928 and 1932 and harked back to the language which had been used in earlier revenue acts which had uniformly been construed by the Treasury to mean that the basis date was the date when the taxpayer actually acquired as his own the property whose disposition gave rise to a taxable gain or a deductible loss. The reason for the change, as shown by the Committee Reports on the revenue act of 1934, was not a desire to alter the settled administrative construction of the phrase "time of acquisition" but to do away with the diversity between the basis dates for real and personal property which had been created by the provisions of the 1928 and the 1932 acts. No other purpose is shown by the reports.[10]

Regulations 86 were approved by the Secretary of the Treasury February 11, 1935, and were later promulgated as applicable to the Act of 1934. By these regulations it is provided: "Pursuant to this rule of law, [i. e. the doctrine of relation] section 113(a)(5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the dece-

8 Senate Report No. 960, 70th Cong., 1st Sess., p. 26.

9 For the language of the section see Note 5, McGuire *v.* Commissioner, — U. S. —.

10 Report of Subcommittee on Ways and Means of December 4, 1933, p. 17; Report of the Ways and Means Committee H. R. 704, 73d Cong., 2d Sess., pp. 27-28; Senate Report No. 558, 73d Cong., 2d Sess., pp. 34-35.

dent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property.'' It is upon this regulation that the Court relies to justify its construction of the statute.

I think the regulation plainly unjustified as an attempt on the part of the Treasury to legislate when Congress has failed to do so. The hearings on the revenue act of 1934 show that the Treasury was not satisfied with the provision the Committee recommended Congress should adopt and which Congress did adopt. It evidently attempted to rewrite the Congressional language to carry out what it thought Congress should have provided. It needs no citation of authority to demonstrate that such is not the function of a regulation and that the attempt should fail.

The CHIEF Justice joins in this opinion.